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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN A CONSERVATIVE ERA*

Kenneth W. Starr

Cass R. Sunstein

Richard K. Willard

Alan B. Morrison

Ronald M. Levin, *Moderator*

EDWARD J. GRENIER: My name is Ed Grenier, Chairman of the Section of Administrative Law. I'm very happy to welcome you today to this program. I think you will find it very interesting and stimulating, so I will get out of the way as quickly as possible and let it roll.

We are privileged to have with us today as moderator of this program Professor Ronald Levin of the Washington University School of Law. He not only conceived this program but also was the chief architect of this report that I hope most of you have, which is a Restatement of Scope-of-Review Doctrine.¹ I must say Ron exhibited the patience of Job in getting this document through our Section Council. I think we spent at least seven or eight meetings on it. Frankly, I don't think it would be finished yet except for our Chairman last year, Bill Murane, who is here in the audience. He finally said, "We are finishing it at this meeting," and, by God, we finished it at that meeting. But here it is, and I think you'll find it extremely interesting and stimulating. We hope it will be read and looked at and debated by scholars, practitioners and interested citizens.

Now, I will let Ron introduce the speakers, but I would like to introduce Ron himself. As I said, Ron is a Professor of Law at the Washington University School of Law. He received his J.D. at the

**Editor's Note:* This is the transcript of a panel discussion presented at the Fall Meeting of the Section of Administrative Law on October 10, 1986, at the International Club in Washington, D.C.

¹Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 AD. L. REV. 239 (1986).

University of Chicago, where he was Article and Book Review Editor of the Law Review. I am also pleased to report, and I take this as a personal privilege, that my partners and I had the privilege of practicing law with Ron for a few years at Sutherland, Asbill & Brennan until he decided to go off to academia. It was a loss that we very much regretted, but now at least we can deal with Ron in a different relationship.

Among his other employment activities, he was law clerk to the Honorable John Godbold, a Circuit Judge on the U.S. Court of Appeals for the Fifth Circuit. Among his numerous publications is one which I think is worthy of note because it has such a wonderful title and suggests what a very imaginative fellow Ron is. The title is "Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith."² I don't know if Ron will try to explain that title, but it sounds very intriguing.

Ron is going to be moderator of this panel session, but actually his marching orders are to be an active and involved moderator, almost a quasi-panelist. I have instructed him to go beyond the bounds of what an absolutely neutral moderator might do. I hope our panelists are forewarned.

With that, I'd like to give you Ron Levin, who will introduce the rest of the panel.

RONALD M. LEVIN: Thank you, Ed. There is good reason to believe that our program today will be able to contribute fresh ideas to the debate over judicial review, because, with one exception, all of the members of the panel, including myself, are in their thirties. I don't suppose Alan Morrison is used to having people regard him as one of the "grand old men of administrative law," but in this company that is a possibility.

I will just mention the panelists and then introduce them more formally as we go along. Sitting closest to me is Richard Willard, Assistant Attorney General of the United States; next to him, Cass Sunstein, Professor of Law at the University of Chicago; beyond him is the aforementioned Alan Morrison, Director of the Public Citizen Litigation Group; and farthest from me, Judge Kenneth Starr of the D.C. Circuit.

I'll stop and say a couple of words about the restatement report, which most of you have just received, because this program was designed in part to highlight the restatement project. Broadly speaking, the doctrines on scope of review can be divided into three categories.

²1987 DUKE L.J. 258.

There are doctrines that are so well established that everybody knows them. There are doctrines that are fairly well established, but that not so many people know. And then there are doctrines that are so totally unsettled that nobody could possibly claim to “know” them.

Concerning the first category, those that are very well established, our restatement project by hypothesis doesn’t have new information to contribute. What we hope it does do is to put these doctrines into a systematic framework. It was our idea that somebody who was new to administrative law could pick up the restatement or blackletter portion—the three pages in front—and get an overview of the topic of judicial review. He could then move on from there to more arcane subjects if he needed to do so.

As for the second area, doctrines that are somewhat established but are not widely known, one thing that we hope our restatement and report can do is to serve as a source of research and scholarship. We have explored some topics that are not covered anywhere else in the literature. To that extent, it’s a source of citations and of guidance.

Then finally we have areas that nobody can have a definitive word about. All we can hope to have done on that score is to state a contemporary view that a good number of administrative lawyers looked at and felt they could live with.

The topics for today’s discussion obviously fall into the third category. There is ample room for debate about both of the topics we have chosen for this session, and the panelists have promised to provide debate as well as disagreement on them. These topics focus around two recent cases—*Chevron v. NRDC*³ and *Heckler v. Chaney*,⁴ both of which represent some indications that the Supreme Court is proposing to move the role of reviewing courts towards a more deferential stance than has been prevalent in the past.

For the sake of topicality here, I’d like to mention a brief sequence from the new television show “L.A. Law,” which premiered last week. Some of you may doubt that the show is relevant to our concerns this afternoon—but it is, because it opens with the death of a lawyer in the firm named Norman Chaney. As Mr. Chaney’s corpse is being carried out of his office, a secretary can be heard in the background answering the telephone and saying, in the blandest possible voice, “Mr. Chaney is not available at the moment.” And so it is with the question we are looking at today: is aggressive judicial review dead—or only temporarily unavailable?

³*Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

⁴470 U.S. 821 (1985).

Our format will be something like this: since we are fortunate enough to have four panelists who are experts on both of the topics before us today, everyone will be able to get into the act on both topics. We'll have two speakers to talk about *Chevron*, and then comments by the others and myself. Then we'll take a break and come back and do the same treatment for *Heckler v. Chaney*.

I'd like to go on at this point to our coverage of *Chevron*. Deference to administrative agencies on issues of statutory construction has been an especially controversial area in the last few years. Roughly since the advent of the Bumpers Amendment,⁵ it has been a hot topic on the administrative law agenda. And *Chevron*, in the year and a half that it's been out, has been emerging as *the* leading case on the subject. This in itself is rather unusual. Until recently there was no such thing as a leading case in this specific area. But during the last Supreme Court term, whenever the Court had occasion to refer to the issue of deference to agencies on statutory issues, it almost invariably cited *Chevron*. That may be only lip service, but it does suggest that *Chevron* is a good place to start in trying to understand that issue.

Our first speaker to talk about the case is Judge Kenneth Starr, who is a graduate of Duke Law School. He is a former clerk in the Fifth Circuit and on the Supreme Court for Chief Justice Burger. He practiced law here in Washington with Gibson, Dunn & Crutcher and then left his partnership to become Counselor to the Attorney General of the United States. Then he became a judge for the District of Columbia Circuit, and tomorrow is the third anniversary of his accession to the bench.

I understand that Judge Starr, before he even attended law school, worked at the State Department, and one of his main duties was to be a tour guide for foreign dignitaries who wanted to see the cities of the United States. So he is well qualified to lead us on a tour of the unfamiliar and mysterious landscape of judicial review.

JUDGE KENNETH W. STARR: Thank you. It's a pleasure to be with you on a perfectly beautiful afternoon, to engage in this rather sobering task of analyzing one aspect of the relationship between agencies and courts. I will try not to make too many points. I'm very mindful of the fact that judges tend not to be particularly coherent, at least when they speak somewhat extemporaneously, as opposed to writing opinions. You will recall the story about Justice Frankfurter's wife, who was asked why the Justice's speeches were not being better received. Mrs. Frankfurter reflected for a moment and said, "Well, you see, Felix has

⁵S. 2408, 94th Cong., 1st Sess., 121 CONG. REC. 29,956 (1975).

two problems. The first is he always strays from the point, but the second and more fundamental one is that he always finds his way back." I will try to limit both the number of points and the amount of straying, as I lead you on this magical tour through judicial review in the post-*Chevron* era.

Let me state a couple of basics on which I hope there will be some consensus. Some aspects of this ever-intriguing relationship between the Article II branch and the Article III branch are gradually becoming clearer. What springs to my mind is the framework for analysis of arbitrary-and-capricious-type challenges. At least we know what the standards are supposed to be, although we realize, of course, that the standards give enormous room for judgment calls. An easy example is the question of whether the agency has adequately explicated the basis for its substantive action. It raises that wonderful problem, as Judge Leventhal put it so well in 1970, of drawing the line between the "tolerably terse" and "intolerably mute."⁶ We know, however, that that's the issue that we have to deal with. Was the agency tolerably terse, or was it intolerably mute? The standard, the framework is quite clear.

Oddly enough, that seems not to be true in this fundamental area of which Professor Levin spoke, the interpretation of statutes. Historically, it seems to me, courts used various modes or approaches when they dealt with a statute which lay in the province of an administrative agency. One was the deference mode. The courts, in acts of humility, looked to see whether the agency had in fact construed the statute which it was charged with administering. If it had, and if the construction was consistent, and especially if it was roughly contemporaneous with the enactment of the statute, then the courts would accept that construction of the statute unless there were "compelling reasons" (the words of such cases as *Red Lion*⁷) not to accept it. Those reasons, like compelling state interests in constitutional law, were relatively rare.

Another traditional mode was the full-blown, rigorous, judicial interpretation approach, regardless of the agency's views of the statute. The judiciary did not need any help, for example, from the expert agency in divining the meaning of the word "wages," even though the word had been the subject of a construction by the Social Security Administration (then Board) in the *Nierotko* case.⁸ We don't need to know what the agency's views are, the Supreme Court said. We are a court, we can wrestle with the word "wages." So, too, in certain legisla-

⁶*Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

⁷*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

⁸*Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946).

tive gap-filling functions, the courts were rather jealous in guarding their prerogatives. The views of an expert agency, the courts held, were utterly irrelevant to the question whether there was an implied private cause of action under a statute.⁹ We didn't care what the agency said. We would make that judgment call ourselves.

Yet another traditional approach was one that was purposive, if you will, in its inquiry. The court, in confronting a statute, particularly against an agency's reading of a statute, would examine whether that interpretation was promotive of what the court deemed to be Congress's purposes. If it was not, then another reasonable interpretation of the statute, which *was* promotive—or was *more* promotive—of the divined congressional purpose, would be accepted by the courts.

This last approach was that which gave rise, as I see it, to *Chevron*,¹⁰ a case which all appellate judges these days bear firmly in mind in reading statutes. It was decided, of course, just two years ago, but it is very frequently invoked, not just by the Supreme Court, but by inferior tribunals trying to do their best at interpreting statutes. *Chevron* was, as you know, the "bubble" case. The issue, very simply stated, was the meaning of the statutory term "stationary source" as found in the Clean Air Act. The battle was over whether a source was an individual piece of equipment, on the one hand, or the entire plant (encapsulated, as it were, in a bubble), on the other.

Upon review, our court found that the term "stationary source" had nowhere been defined by the Congress and the legislative history was conflicting. "[A]t best contradictory" were the words of the court.¹¹ So, since Congress was unclear, our court, using the traditional tools of interpreting statutes, felt at liberty to provide its own interpretation. After all, that's what courts do day in and day out—we read statutes. In this case, the D.C. Circuit concluded that the purposes of the statute should guide the decision. We found that, while the bubble concept was mandatory for certain Clean Air Act purposes, when designed merely to maintain existing air quality, the concept was inappropriate when applied to programs designed to enhance or improve air quality, as in *Chevron* itself. The regulation of the Administrator was thus deemed incompatible with these fundamental purposes of the Act.

This approach seems rather sensible. It certainly seems to be trying to vindicate Congress's general intent. It was not a vague set of purposes that was being relied upon, or a mechanical invocation of the

⁹Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 n.27 (1977).

¹⁰467 U.S. 837 (1984).

¹¹NRDC v. Gorsuch, 685 F.2d 718, 726 n.39 (D.C. Cir. 1982).

notion that environmental legislation is remedial in nature and thus must be generously interpreted. Not at all.

I think, upon reading what the lower court did in *Chevron*—I was not on the panel—that it engaged in a thorough, lawyer-like analysis of the entirety of the statute. And it was an effort analogous, it seems to me, to what federal courts have to do in diversity cases every day—divine what a state court might do if confronted with this particular issue. To make a reasoned judgment, with respect and with restraint, about what the statute would have said if the question had been put directly to the Congress. This approach, whatever its demerits, at least embodied a good faith attempt to vindicate legislative supremacy. It certainly was not, if I may use the term, an “activist” decision. It was not the imperial judiciary riding roughshod over the agencies, as we were authoritatively convicted of doing in *Vermont Yankee*.¹² The court in a very painstaking opinion was seeking, I believe, to follow the law as Congress had laid it down. There was frank recognition of the fact that (legislative compromises and the dynamics of the legislative process aside) Congress will invariably fail adequately to anticipate and address each serious question likely to arise in a statute’s administration.

But the Supreme Court was unmoved by our efforts. It did recanvass the statute. It did recanvass the structure and the legislative history. And it didn’t disagree with us on what I’m going to call *Chevron* Step One. But it said that we had guessed wrong, or rather that we shouldn’t be guessing at all, about what Congress “would have done.” We had been a bit rude, as it were. We had ignored a guest sitting at the dinner table. We had been talking to the lawyer representing this guest from the Justice Department, but we had not paid adequate attention to what our distinguished guest, the Administrator of EPA, had herself said on the subject. So in this unanimous opinion for a bobtailed Court, Justice Stevens began by chastising the court of appeals for a basic mistake.

Now, this is odd. This is like Law 101. You would think our court would know how to go about the process of reading a statute. But our mistake was that we had misconceived the very nature of the judicial role in reviewing the bubble regulation. Once our court had determined that Congress did not actually have an intent regarding the applicability of the bubble program, the Supreme Court instructed us, our inquiry should have been whether the Administrator’s view that it was appropriate, in the context of this particular program, was a “permissible” one (a term which, as you know, the Court proceeded to

¹²*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

use interchangeably with the term “reasonable”). Thus was born—or “re-announced,” for those who believe that *Chevron* signaled no change whatsoever in the way we go about our business—the “*Chevron* two-step.” It is a straightforward, I believe clear, analytical framework. We now know how to do it.

Step One is to find out Congress’s intent. This isn’t intent writ large, mind you, such as a cleaner environment or a safer working place. It is specific intent, if you will. The Court, in Justice Stevens’ words, is to determine whether Congress has “directly spoken to the precise question at issue.”¹³ Now that is obviously a narrow, exacting test, putting quite an onus on the courts and, of course, ultimately on the Congress to legislate with considerable specificity. I find that the crafting of language on which three people can agree is difficult enough, even when those people are reasonable people who sit down with a common goal in mind. Congress, of course, sits and legislates en banc with 535 members of the tribunal. Even when Congress sits in panels, its committees, those panels exceed our much more manageable number of three. So the sheer challenge of draftsmanship in a political environment is daunting enough, but to couple that with prescience as to how the statute will in fact play out, will come alive in the regulatory setting, is asking quite a bit.

So we move to the second part of the *Chevron* two-step. In cases where Congress’s specific intent is not clear, then the question before the court is to look at what our special guest sitting at the table, the Administrator, has said, and to make a judgment as to whether that is reasonable. As I say, the Court in *Chevron* agreed with our analysis of what we now know to be *Chevron* Step One. Congress had not, through the statute and its legislative history and structure, spoken to the precise question at hand. The Administrator’s bubble approach, while not the only approach, was nonetheless permissible and reasonable, the Court concluded.

I think it’s instructive to look at why the Court concluded that the Administrator’s interpretation passed Step Two. The Administrator had, in fact, indicated that the non-bubble, individualized approach could actually retard programs. It would be counterproductive not to employ the bubble approach. Certain plausible management efficiency advantages were advanced, such as reducing confusion and inconsistency, those twin evils that infect seemingly every regulatory program.

Chevron thus established the analytic framework for judicial review

¹³*Chevron*, 467 U.S. at 842.

and interpretation of statutes. Not everyone has caught on to this fact. We continue to see in filings in our court a lot of *Red Lion* and *Udall v. Tallman*¹⁴—type language suggesting that we simply look to the agency's reading—as with the old saw, “when the legislative history is in doubt, go to the statute.” They say, let's start with what the agency did. On the other hand, we see language suggesting that we need not pay any attention at all to the guest seated at our right. After all, it was no lesser light than John Marshall who said, and we see this a lot, “It is emphatically the province and duty of the judicial department to say what the law is.”¹⁵ However Olympian that sentiment may be, it seems not to capture entirely the spirit of judges' work in the modern administrative era. Chief Justice Marshall had before him the Constitution and a set of statutes to construe. He was spared such delicious contemporary morsels as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or the Resource Conservation and Recovery Act of 1976, as amended in 1978, 1980 and 1984. John Marshall was not required to face the Internal Revenue Code, much less CERCLA and RCRA.

In the two terms since *Chevron* came down, if my count is right, *Chevron* has been employed with regularity, and in all cases save one the agency won the case. In the *Chemical Manufacturers* case,¹⁶ involving EPA's interpretation of a specific term, the issue was the meaning of the word “modified” as found in a particular provision of the Clean Water Act. The Court was sharply divided, losing the unanimity it had enjoyed in *Chevron*. Five Justices concluded that the word “modify” was ambiguous under Step One and moved on to Step Two, upholding the agency on what I think were *Chevron*-type grounds of regulatory management efficiency. It makes sense to do it that way. Four Justices, while making very clear that they agreed with the *Chevron* analytic approach, wanted to stop at Phase One of the *Chevron* two-step. The word “modify,” they thought, under these specific circumstances was quite clear and thus the Administrator could not lawfully grant the so-called FDF variances.

In *Riverside Bayview*,¹⁷ the agency won unanimously under a Step Two analysis. The Corps of Engineers was regulating activities on wetlands which a builder had development designs on. The specific question was whether the statutory term “navigable waters”—which Congress had helpfully defined as “the waters of the United States”—

¹⁴380 U.S. 1, 16–18 (1965).

¹⁵*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁶*Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116 (1985).

¹⁷*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

included wetlands. One might think, as did the developer and the inferior court in that case, that wetlands, which after all were *lands*, were not "navigable waters." But of course one would be wrong, as the Court pointed out in a very thorough and careful opinion.

One should not despair, however. The Court really does not think that Congress is institutionally incapable of having specific intent, sciemer, if you will, as opposed to a Rousseauian general will. For in the "non-bank bank" case, *Dimension Financial*,¹⁸ the Court came down unanimously, as you know, against the agency. The Fed would not be permitted to assert jurisdiction over these newcomers to the financial services scene. The Court held the Fed to a rather strict reading of the statutory definition of "bank" as found in the Bank Holding Company Act of 1956. Custom and practice would not do, nor would so-called substitutes for commercial loans do. The statute was, in the retired Chief Justice's words, "clear and unambiguous," a conclusion that I note has been sharply attacked in some of the trade press.¹⁹

One is thus brought to wonder if there can be, other than in banking regulation, a clear and unambiguous statute. Is the world really filled with "quiche" that is subject to regulation by Judge Winter's National Quiche Commission, even though the NQC is regulating what all of us, outside of administrative law at least, would think of as pizzas and frisbees?²⁰ After all, no lesser light than Chief Justice Hughes found the term "foreign country" to be inherently ambiguous.²¹ And in a relativistic age where one still hears an occasional jeremiad against cultural imperialism, whatever that is, perhaps nothing does have clear meaning other than the word "bank."

"Modify" is ambiguous. So is "waters of the United States" ambiguous, and so is "stationary source," and so from a half-century ago is "foreign country." So, too, although in a different way, the Court ten years ago found the word "unemployment" in *Batterton v. Francis*²² to be ambiguous. We certainly know from a case close to my heart, *Young v. Community Nutrition Institute*,²³ that it does not take much to make for ambiguity. Even statutes which the Court says have a "more natural reading" may, in fact, be infected with that modern universal disease of ambiguity. Ambiguity seems to have taken on epidemic proportions.

¹⁸Board of Govs. v. Dimension Fin. Corp., 474 U.S. 361 (1986).

¹⁹Fein, *Agency Discretion Unwisely Limited in 'Dimension'*, LEGAL TIMES, Feb. 10, 1986, at 10.

²⁰Winter, *The Quiche Brief*, REGULATION, Sept./Oct. 1986, at 31.

²¹Burnet v. Chicago Portrait Co., 285 U.S. 1, 5 (1932).

²²432 U.S. 416 (1977).

²³106 S. Ct. 2360 (1986), *rev'g* 757 F.2d 354 (D.C. Cir. 1985) (Starr, J.).

This century has not been kind to those of us who rather curiously and quaintly think that there is such a thing as plain meaning or normal meaning, even though it is at times trotted out and employed in the jurisprudence from the High Court. But as an optimist I refuse to succumb to the cynicism that might infect some portions of the academy (other than those inhabited by my former colleague from the fifth floor of the Justice Department, Professor Sunstein, from whom you're about to hear).

The reason that I am not pessimistic is that Step One, I believe, is a real test with real teeth and in fact can reasonably be argued to vindicate an appropriate judicial role. My court, with a panel of Judges Silberman, Buckley and yours truly having the honor of writing, held not so many days ago that the ICC's interpretation of a particular statute ran afoul of Step One, in a case of some interest involving Norfolk Southern's acquisition of North American Van Lines and about which there seems to be some legislative interest.²⁴ And, as I say, in *Dimension Financial* the Supreme Court unanimously invalidated agency action under Step One and in *Chemical Manufacturers* four Justices voted to overturn EPA's reading under Step One.

So I offer quickly, for what it's worth, one rather general observation from my reading of these cases: If the question seems to the Court to reduce to one of managerial judgment, if you will, or regulatory judgment, the Supreme Court may very well move on to Step Two. That seems to me to be a theme common to *Chevron* and *Chemical Manufacturers*. Both cases could reasonably be seen as issues of regulatory management. "It's complex," says the agency, "and we're trying to muddle through, and here is the basis for our effort at muddling through." It seems to me we're not going to see as much deference in cases going to the very heart, the core, of the agency's power, which was of course the case in *Dimension Financial*, or as would be the case in our hypothetical National Quiche Commission trying to regulate donuts. Compared to questions of managerial judgment, Congress at least speaks, if you will, when it shapes a grant of power. Perhaps what we're reading in the cases is a sense that Congress is at least trying to speak with as much specificity as it can when it grants power.

But this is no grand theory by any means, for in such cases as *Haig v. Agee*²⁵ and *CIA v. Sims*,²⁶ which Mr. Willard successfully argued in the Supreme Court, the Court emphasized the sheer breadth of the grant of power, as in a way presumptively validating the agency's view of its

²⁴International Bhd. of Teamsters v. ICC, 801 F.2d 1423 (D.C. Cir. 1986).

²⁵453 U.S. 280 (1981).

²⁶471 U.S. 159 (1985).

own power, even if that view did not find a clear “textually demonstrable basis,” to paraphrase *Baker v. Carr*.²⁷ We need not move into what might be viewed as the sui generis field of foreign affairs and national security to find nonspecificity in a grant of power. We need only recall our wetlands case and our frustrated developer, where “navigable waters” was defined as “waters of the United States.” In that case, *Riverside Bayview*, the Court conducted what can be fairly viewed as a thoroughgoing and rigorous and lawyerlike analysis. It demonstrated, although reasonable minds can differ, I suppose, that Congress had in at least one part of that statute expressly conferred jurisdiction on the Corps of Engineers with respect to wetlands.

A second observation is that the courts have tended to look at the general intent of Congress in deciding how vigorously to scrutinize the agency’s interpretation. If it seems apparent that Congress intended a very broad grant of power, then the courts may prove to be more deferential in examining the agency’s definitional handiwork. If Congress says, in essence, “here is a problem, go solve it, but do so with limited resources,” then Congress may very well have expressly delegated definitional or interpretative power.

We saw this in *Batterton v. Francis*, where the Court took a rather hands-off approach in scrutinizing the term “unemployment.” Now, “unemployment” seems more akin to the term “wages” in *Nierotko* than it does to a complex term like “stationary source,” which was at issue in *Chevron*; thus, one might expect a fuller blown, less deferential approach in construing a key term. But the Court concluded that Congress’s intent was to delegate very broad powers to the Secretary of HEW to craft a comprehensive welfare scheme. The Court in that case seemed to appreciate the seamless web nature of the administrative enterprise. One could not ignore the fact that Congress’s intent was for the Secretary to go ahead and construct an entire system. As in systems analysis, all parts of the system interact, and judicial nitpicking at certain strategic points in the system might well have untoward and counterproductive consequences, if not windfall consequences, for certain beneficiaries of an entire regime—even though the courts’ intervention might arrive cloaked in the guise of vindicating the broad, remedial, compassionate purposes that had animated Congress in the first instance to create an AFDC-type scheme. The courts, to put it crassly, might, by donning their Olympian *Marbury v. Madison* robes, be unwanted do-gooders gumming up the works out of the most laudable motives.

²⁷369 U.S. 186, 217 (1962).

All of this brings me finally to some observations about Step One of *Chevron*. Step One, needless to say, raises some rather difficult questions of interpretation for the judiciary. The first is one I have alluded to already at somewhat untoward length: what force do words themselves have? If we are all too sophisticated these days to embrace the plain meaning rule—of which some of us are fond—where do we go without it? Could we repair to a normal meaning rule? Even Frankfurt-er, the modernist skeptic, believed that ordinary statutes are in fact addressed to ordinary men and women, and thus should bear the ordinary reading of everyday life.²⁸

The second is the use of legislative history. The Supreme Court gives us mixed signals as to its appropriateness. It is appropriate at times; it seems not to be appropriate at other times. At times when it seems to be inappropriate, where the statute is clear and unambiguous, nonetheless the courts will check the legislative history to make sure that there is no ambiguity to be put into the statutory language itself from the legislative history. Our own court of late, in such cases as *Abourezk*²⁹ and now-Justice Scalia's concurring opinion in *Hirschey v. Federal Energy Regulatory Commission*,³⁰ have cast some considerable doubt on the value of legislative history. There seems to be at least some sentiment that the old and pure English rule may be better, both in attorneys' fees and in the reading of statutes.

The third is in doctrines like legislative acquiescence, employed in such decisions in this decade as *Haig v. Agee* and *Bob Jones*.³¹ One might think it's as odd a way to make law as is legislative history. Is this indeed a legitimate source for discerning Congress's intent? It is one thing to pass a statute in the face of clear, consistent administrative interpretations that are known to Congress as a whole, as opposed to an oversight committee. It seems another for Congress simply to have been informed of an administrative interpretation, and taken no action of any sort. The Court, as in the wetlands case, will sometimes say it is chary of attributing too much significance to situations of the latter sort; but nonetheless, as I say, we see that doctrines like legislative acquiescence live on.

It would seem that the failure to enact a statute should have about the same probative value as a decision not to take enforcement action. Congress, like enforcement agencies (to foreshadow a bit of our discussion to come), has scarce resources. It might even be counting on the

²⁸Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 618 (1944).

²⁹Abourezk v. Reagan, 785 F.2d 1043, 1054 n.11 (D.C. Cir.), cert. granted, 107 S.Ct. 666 (1986) (No. 86-656).

³⁰777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

³¹Bob Jones Univ. v. United States, 461 U.S. 574, 600-02 (1983).

courts, when the interpretation of the agency mandate gives rise to an actual case or controversy, to vindicate Congress's original intent, as it were. Plus, the whole notion or doctrine of acquiescence raises difficult questions of subsequent Congresses giving definition to what an earlier Congress, gone out of existence, had done.

I will conclude by saying that I think we are in relatively uncharted territory, because very little law has been made, with respect to *Chevron* Step Two. When is an agency's interpretation reasonable when the statute is in fact infected with ambiguity? There's precious little law out of our Circuit. And, at least at this stage, as I count it, not a single Justice has, in *Chevron* or since, cast a vote against the agency under *Chevron* Step Two.

Thank you for your very kind patience.

PROF. LEVIN: There are those who suspect that the reason I wanted Cass Sunstein to be on this panel today was that I wanted at least one panelist who would be younger than myself. That wasn't my reason, but if I had had some such plan in mind, he would have been an obvious choice. During the past five years, while he's been on the faculty of the University of Chicago Law School, he has written (by my count from his resumé) 27 articles in the fields of administrative law and constitutional law. And, lest you think that quality is going out the window for the sake of quantity: when I invited Cass to be here with us today, I didn't realize he was coming to our Section of Administrative Law meeting anyway—to receive our Section's first Annual Award for Administrative Law Scholarship. It will be presented to him for a recent article of his in the *Stanford Law Review*,³² a very interesting blend of administrative law, constitutional law, and constitutional history.

Before joining the Chicago faculty, Cass graduated from Harvard Law School, clerked on the Massachusetts Supreme Judicial Court and the U.S. Supreme Court, and also worked in the Office of Legal Counsel of the Department of Justice. At present, though affiliated with Chicago, he's a visiting professor at Columbia Law School.

CASS R. SUNSTEIN: Thank you very much, Ron, and all of you.

Perhaps because of my different institutional position, I am less of an enthusiast for the *Chevron* decision than is Judge Starr. The problem, as I see it, is that the decision threatens, first, to confuse rather than clarify the law governing judicial deference to statutory interpretation by administrative agencies. Second, and more fundamentally, I think the case threatens to undermine rather than promote separation of powers principles that have been with us for a long time.

³²Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

The discussion will come in three parts. I will begin by pointing to a definitional ambiguity in the *Chevron* decision, which is critical to its reach and importance. Second, I will discuss what's wrong with a "strong" reading of *Chevron*, a reading that I think Judge Starr does not approve of. Third, I'll make some criticisms of the understanding of *Chevron* that Judge Starr has set out, and try to suggest an alternative position about how courts should approach administrative interpretation of statutes.

Chevron says, as Judge Starr points out, that there is a distinction between two possible situations. In the first, Congress "has directly addressed the precise question at issue."³³ That is Judge Starr's *Chevron* Part One. Part Two is when Congress hasn't addressed the precise question at issue. When that happens, says the *Chevron* Court, the general rule ought to be one of deference. The definitional ambiguity in *Chevron* has to do with the reach of those two categories. Note that Category One is one as to which courts are not supposed to be terribly deferential. In examining those questions, the court can look independently. But if Congress hasn't "directly addressed the precise issue," then there is to be considerable deference to the agency interpretation.

One could read *Chevron* in one of two ways. Let's call the first one a "strong" reading of *Chevron*. This one you can see in several recent Supreme Court decisions. The strong reading goes, basically: *Chevron* proclaims a rule of judicial deference to administrative interpretation of statutes. That reading fits comfortably with the language of *Chevron*. The reason? Well, as Judge Starr points out, statutes are very generally ambiguous. That's what generates lawsuits. If in the face of statutory ambiguity the rule is one of deference, then what *Chevron* means essentially is a posture of judicial deference.

A second, "weak" reading of *Chevron* would emphasize that the case recognizes the existence of a large area in which Congress has "directly addressed precise questions." In that large area, courts should play an independent role. Judge Starr's reading of the *Chevron* decision is this weaker reading, which allows more in the way of judicial independence in reviewing statutes. That one bothers me less. But let me begin by talking about the strong reading of *Chevron*. Again, the strong reading is that courts should defer generally to administrative interpretations of statutes because generally there will be ambiguity. When there's ambiguity, Congress hasn't directly addressed the precise question at issue. Herewith some criticisms of *Chevron* as thus understood.

The first criticism comes from *Marbury v. Madison*. Courts, not ad-

³³*Chevron*, 467 U.S. at 842.

ministrative agencies, are supposed to say what the law is. This principle is a very familiar one. The idea is that those who are limited in their authority by law should not be the judge of those limits. Administrative agencies are constrained by statute, that is, law, and the mere fact that the statute is ambiguous shouldn't give the agency, of all people, the authority to decide on the meaning of the limitation. The cute way in which it's sometimes put is that foxes shouldn't guard henhouses. If *Chevron* is taken to mean that agencies judge the scope of their own authority, then one has precisely that problem.

The second criticism is that *Chevron* is too crude and undifferentiated in its strong version. The category of "agencies interpreting law" captures a wide territory. Most important, there's a difference between pure questions of law, questions that turn only on the meaning of statutes, and mixed questions of law and fact, as to which agency expertise is far more relevant. In deciding whether the Occupational Safety and Health statute is a feasibility statute or a cost-benefit statute³⁴—that one calls purely for lawyers' competence. What does the statute mean? Administrative agencies' fact-finding competence is not relevant. If the question, on the other hand, is whether benzene poses a significant risk within the meaning of a statute,³⁵ agency fact-finding expertise is relevant. *Chevron* collapses this critical distinction between pure questions of law on the one hand and mixed questions on the other.

Criticism number three is that *Chevron*, understood in this strong version, is inconsistent with Congress's own hopes and expectations. One has to understand that the Administrative Procedure Act³⁶—enacted, incidentally, by conservatives—was designed to limit administrative agency authority and, in the words of Justice Frankfurter, to express a "mood" calling for stronger judicial control of administrative action.³⁷ The Administrative Procedure Act, the basic charter governing judicial review of agency action, can hardly be understood as a proclamation in favor of judicial deference to administrative agency interpretations of law. If there's any evidence of congressional views in the meantime, those views are very much in accord with the original spirit of the Administrative Procedure Act, that is, that administrative agency interpretations of law should not be deferred to.

Criticism number four is that this emphasis on "directly deciding precise questions at issue" misconceives statutory construction. Statu-

³⁴American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981).

³⁵Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

³⁶5 U.S.C. § 706 (1982).

³⁷Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

tory construction is not a search for direct decision of precise questions. It's much more complicated than that. Congress often doesn't foresee how its laws will be applied or what the particular circumstances will be. Statutes are designed, and here's the key point, to guide the exercise of discretion in unforeseen cases. One can, and courts do, extrapolate from statutes principles that constrain the exercise of administrative authority even in circumstances about which Congress has thought not at all.

Here's criticism number five, and the final one, of this strong understanding of *Chevron*. One point that *Chevron* misses, and this is critical, is the uneasy constitutional position of the administrative agency. Administrative agencies pose all of the problems that have produced a judicial review section of the APA precisely because they are only indirectly accountable. They are not directly accountable to the President (though President Reagan, I think fortunately, has taken steps in that direction), nor are they accountable directly to the Congress. They are subject to institutional pressures and occupational hazards which make their decisionmaking flawed in ways that aren't implicated when the decisionmaker is the President or the Congress. All that is to suggest that the uneasy constitutional position of the administrative agency justifies an aggressive judicial role, above all in interpreting administrative agency understandings of law. This is an understanding which Congress shares.

That set of criticisms persuades me at least that *Chevron*, understood in its strong version, as a plea for judicial deference in the face of ambiguity, is a mistake. One should hope and expect the Court to recede from it in the future. There is a little sign in this direction from Justice Stevens, the author of *Chevron* itself. In dissenting from a Supreme Court decision that overruled, wrongly in my view, a decision of the District of Columbia Circuit penned by a judge who shall go unmentioned, Justice Stevens said that the role of the reviewing court is not to manufacture ambiguity and then to defer.³⁸ This was written by the author of *Chevron*.

Okay. I have suggested that if *Chevron* is taken, and there are signs that it's being taken, as a plea for judicial deference to administrative interpretations of law, it's a big mistake. Judge Starr's reading is a weaker reading, and I want to make a few milder criticisms of that position.

First, here's how I think the Court should deal with this problem. This isn't made up out of the blue; it captures widespread practices by

³⁸Young v. Community Nutrition Inst., 106 S. Ct. at 2368 (Stevens, J., dissenting).

courts before *Chevron*, the best of the Supreme Court practices and D.C. Circuit practices before *Chevron*. It goes as follows: You have pure questions of law, and you have mixed questions. You have questions which call for legal skills strictly, and you have questions that call for administrative skills as well. The administrative skills are applicable when the relevant question turns not just on the statute and its history but turns also on an assessment of the facts. Whether benzene causes a statutory "significant risk" is an example. The basic line which the best courts I think adopted before *Chevron* involved looking at that issue: Is it a pure question of law or is it a mixed question of law and fact? That's the line by which you decide how much deference to offer.

I prefer that approach to the weak version of *Chevron* for a few reasons. Let me remind you what the weak version is. The weak version is that we have two categories, one in which Congress has directly decided precise questions, and one in which it has not. If Congress has directly decided precise questions, no deference is due, and we will take that possibility seriously. But not directly deciding precise questions is also possible, and in that context the administrative agency likely wins.

The first problem with that interpretation is this: If it means that in the face of ambiguity, administrative agencies win so long as their view is plausible, it seems to me vulnerable to most of the objections I've set out already. If there is ambiguity, the agency ought not automatically to win. The question, insofar as it's a pure question of law, is for judicial rather than administrative determination. Ambiguities in statutes should not be resolved favorably to administrative agencies in every case.

The second objection is that the notion that the question is "whether Congress is directly deciding precise questions or not" seems to me an incorrect way to understand statutory interpretation. The issue instead is, what does the statute mean? Often statutes will have meanings that constrain administrative agency behavior even in cases in which Congress hasn't directly decided precise questions at issue. This criticism drops out if the notion of directly deciding precise questions can be translated into the question, what does the statute mean? If that's what *Chevron* is about, then I'm satisfied. But I think this opposition between *Chevron* One and *Chevron* Two, which Judge Starr rightly points to in the opinion, is highly artificial.

My third criticism, and I think this is the most important one, goes as follows. What *Chevron* represents in this weak reading version, which I much prefer to the strong reading, is a familiar confusion. It confuses the scope of review with the merits. Here's why that is so.

Administrative agencies will often win, even on a pure question of law, when Congress in the statute has not said anything relevant to the issue. What the Court should have said in *Chevron*, I think (and the case was rightly decided), was that Congress hasn't forbidden this administrative action. That's not a principle of deference, or a thumb on the scales in favor of the agency, that's straightforward statutory construction, under my framework of pure questions of law versus mixed questions. Agencies will often win on both pure questions of law and mixed questions for a very simple reason: often statutes do not constrain administrative behavior. To collapse the notion of deference and the agency's winning, as *Chevron*, I think, does, is to collapse scope of review and the merits. They are two separate issues. That's why to me it makes more sense to do what the Supreme Court did in a number of cases, including the *Hearst* case,³⁹ which is to distinguish between the pure question of law and the mixed question of law and fact.

Okay. Let me conclude. What *Chevron* threatens to do, with either a strong reading or a weak reading, is to undermine some separation of powers principles that have been around for a long time. The basic notion that courts rather than agencies interpret law is not unobjectionable. It's filled with possibilities for errors. The courts make occasional mistakes. Nonetheless, that principle is built into the constitutional structure and is basically sound. Courts rather than agencies should be the interpreters of law. Courts have institutional advantages. That principle is, to some degree at least, threatened by the *Chevron* decision. That's why for me the case is a reason for concern rather than approval.

Thank you.

PROF. LEVIN: We're now going to have some briefer comments on the presentations we've just heard from our other two speakers. The first of them is Richard Willard, who graduated from Harvard in 1973, clerked on the Ninth Circuit and the Supreme Court, then worked at Baker & Botts in Houston before joining the Justice Department. He has been for the last five years at the top of the Civil Division of the Department of Justice, first as Deputy Assistant Attorney General, then Acting Assistant Attorney General, and now as the Assistant Attorney General in charge of the Civil Division—which, of course, is the division in which the government presents its positions on the very issues we are discussing today.

I trust that we will get the government's view, at least in short compass, right now from Mr. Willard.

³⁹NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944).

RICHARD K. WILLARD: I guess part of my disagreement with what Cass has said goes back to the issue of “separation of powers,” with which he ended. I am constantly irritated at hearing the epigram from *Marbury v. Madison* used to say that it is the province of the courts to decide what the law is. I do not think that’s what *Marbury* means. I think the courts’ role in our constitutional scheme of government is to decide cases or controversies. And in the course of deciding cases or controversies, they decide what the law is only where necessary in order to reach a result.

The role of our courts is not as a guardian of the henhouse or as a check on administrative agencies’ interpretations. There is no such functional analysis; and there is no reason to believe that courts are better at interpreting statutes than executive agents. It is the same as with the role of the Supreme Court in our system. The reason the courts have the final say on interpreting statutes is that litigation finally resolves these issues as courts resolve cases or controversies.

Thus, it is not that the Framers thought the judges were going to be smarter in interpreting statutes than people in the Executive Branch; it’s simply that they have the last say. In other words, the Supreme Court is right because it has the final word. It does not have the final word because it is always right. And the same thing is true for the courts generally.

Consequently, I think there is no reason to view courts as having some special role in statutory interpretations vis-à-vis agencies, aside from the fact that they will frequently end up exercising the final say.

The second disagreement I have is with regard to what statutory construction is all about. I do not believe that statutory construction is a complex search for values with which to decide situations that Congress didn’t consider when passing the statute. As far as I am concerned, statutes either do something or they don’t. They do not contain some sort of encrypted set of values that the courts will try to “puzzle out” in dealing with things Congress never considered. If the Congress never really considered something, or if the statute doesn’t really address a particular situation, then it doesn’t do anything and it doesn’t have the force and effect of law.

Cass’s view is one on which many courts in the D.C. Circuit particularly love to expound. As he has said—quoting from his University of Chicago article—“courts are charged with promoting adherence to the governing statute—with adherence understood to include identification and implementation of the values set out in that statute.”⁴⁰ I submit

⁴⁰Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 668 (1985).

that Congress does not enact values. It passes laws. It either does something or doesn't do something. When you talk about the intent of Congress, it's only a means of understanding the action of Congress or what it did. It is not a situation where the courts ought to, as Judge Starr indicated earlier, sit down and try to guess what Congress would have done if it had considered a particular factor when writing the statute. Either it did something about it, or it didn't. That is clearly the question.

Therefore, the *Chevron* analysis is really quite helpful, because the first step is designed to say, did Congress decide this issue in terms of writing the statute? If it did, that, of course, governs the matter. Otherwise, if Congress simply authorized an administrative agency to act, with the power to do certain things, and if what the agency has done does not violate what the statute says, then one could assume the agency could get away with doing it—subject, of course, to the limitations imposed by other statutes such as the Administrative Procedure Act, which forbids arbitrary and capricious acts, and so forth.

Thus, so understood, *Chevron* is a very helpful test and a helpful way of corraling the open-ended judicial arrogance that is so richly characterized by the D.C. Circuit's jurisprudence for the past 20 or 30 years.

PROF. LEVIN: I will just briefly introduce our last panelist, who might be expected to offer some disagreement. Alan Morrison is a graduate of Harvard also. He practiced law in New York as a private practitioner and then worked as Assistant U.S. Attorney in the Southern District of New York. Since 1972 he's been the Director of the Public Citizen Litigation Group. In that capacity he has handled a number of cases, but he has gained particular celebrity recently as the winning counsel in both the legislative veto case, *INS v. Chadha*,⁴¹ and the recent Gramm-Rudman case, *Bowsher v. Synar*.⁴² He's one of this city's leading administrative lawyers and certainly is a foremost spokesman for the public interest bar.

ALAN B. MORRISON: Judging by Richard Willard's example, I see that I don't even have standing in this context, and so will remain seated!

I do not choose to spend what little time I have today arguing about the underlying premise of *Chevron*, except to say that I think it is not correct and has gone too far. One of the saving graces is that the Court regularly chooses to disregard it, avoiding Judge Starr's criticism and analysis by simply not citing it. It's not getting picked up when the Court does what it chooses to do.

⁴¹462 U.S. 919 (1983).

⁴²106 S. Ct. 3181 (1986).

It seems to me that even if one were prepared to accept *Chevron*, there are, in the language of Judge Leventhal in the *Greater Boston* case,⁴³ a number of "danger signals" the court ought to be on the lookout for. You ought to say, even if you are prepared to allow the agency to decide what wages are, what employees are, and whether bubbles are good, bad, or indifferent, that there are a number of different situations in which the court should be very careful before allowing deference, even when Congress has been ambiguous. Let me give you a few of them.

Starting in no particular order except the order in which I happen to have jotted them down on my notes here: First, when there are constitutional issues at stake, the agency's interpretation ought not to be given deference. Second, when the agency seeks to expand its power or jurisdiction, no deference is due. If, in the nonbank bank case,⁴⁴ the Court had said, "we ought to be very careful, because they're seeking to aggrandize themselves, and for that reason we give no deference," I would be much more pleased with that analysis.

The difficulty with Mr. Willard's approach, of course, is that in many cases Congress does not say what can or can't be done. The agencies, after all, in our system of government can do whatever they want to do unless someone tells them they can't. Rather, it's the opposite way around. The agencies get power when Congress gives it to them, and if Congress doesn't give them the power, some way or other they've got to find it, or they can't act. I don't think deciding whether there's some general law on the subject is going to answer the type of questions that come up very often.

Third, I would say we ought to be careful when agencies start construing their statutes in a way that fundamentally undermines their mission. If the agency is supposed to be protecting health and safety, and it says, "We don't have the authority to protect health and safety," I think the courts ought to say, "Wait a second, is that really what ought to be going on?"

Fourth, I would say when agencies are placed under procedural constraints, not by the basic Administrative Procedure Act, but by special provisions in the governing statute, the agency ought to be particularly careful. To take an example, do you think the Federal Trade Commission, when acting under the Magnuson-Moss Act,⁴⁵ ought to be given deference in deciding what kind of procedures are

⁴³*Greater Boston Television Corp. v. FCC*, 444 F.2d at 853.

⁴⁴*Board of Govs. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

⁴⁵15 U.S.C. § 57a (1982).

sufficient? I think it could hardly be clearer that Congress wanted to put a lid on that agency when it was undertaking certain kinds of activities. It would be a failure to honor congressional intent to give deference to those particular interpretations, in light of the procedural constraints that have been imposed.

Fifth, I would say no deference is due when the agency has its own vested economic interests at stake. I recently had occasion to get a call from Judge Starr's old law firm, Gibson, Dunn & Crutcher, who was representing a client I don't normally side with, Marathon Oil Company. They have a little dispute with the Department of the Interior in which the Department has now said, "We think that the royalty payments that you are giving to us are improperly calculated. We are in essence doubling, or imposing some multiple of, the payments and we are interpreting our statute to mean that we can do that. As a result, *we* get more money, *you* get less." Now I don't know about you, but I get a little nervous when the Ninth Circuit says "*Chevron*" and the agency wins.⁴⁶ It seems to me that cannot be what the law is intended to be. Yet if you read *Chevron*, there's no ifs, ands, or buts in there at all.

Then, aside from obvious questions of due process in a situation like that, it seems to me that there are other danger signals that you ought to look to. There are situations in which the agency has gone to Congress and said, "We don't like this law, we want it changed," and then they go out and issue interpretations which enable them to try to do, by the back door, that which they haven't been able to do by the front door. The same, I think, is true with interpretations that come up in the context of litigation.

I am sure that all of you could come up with other examples of danger signals. I simply say to you that we ought to think long and hard before automatically invoking *Chevron*. As I was dusting off my old Bumpers file before today's meeting, I thought that maybe old Senator Bumpers wasn't wrong. Or at least, maybe he was wrong then, but now he has occasion to want to come back and do what he tried to do some time ago.

Two other observations: In theory the *Chevron* decision ought to be neutral. That is, I as a public interest lawyer and others here who represent business groups ought to have no particular view about whether *Chevron* is a good thing or a bad thing based on institutional positions. These days, if the agencies are being deferred to, I know what the result is going to be. But if there should be a change in

⁴⁶Marathon Oil Co. v. United States, 807 F.2d 759, 765 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987).

administration a few years from now, and the Democrats were to get in, a much more friendly atmosphere to me, I would wonder how many of you would think we ought to continue to defer to administrative agencies the way we did in the good old days. The test will be, of course, whether the courts continue to defer, or whether "clarity" in the *Chevron* sense becomes more or less clear, or however clear one needs to be, in order to get around the first step of *Chevron*.

The last point I want to make is that we are in an interesting reverse *Chevron* case now. We filed a petition with an agency, and the agency came back to us and said, "That's a wonderful idea, but unfortunately the statute won't let us do it." We have said to them, "*Chevron*!"

PROF. LEVIN: I'm going to make a few comments about *Chevron*, approaching it more from the technician's angle than from the philosopher's angle. First, I'll mention briefly the two-step framework and how to make sense of it. Then I'll deal with the first step, which I think is the more important one, and critique or evaluate its phrasing. Then I'll address just how much deference that step really envisions.

I have problems with the two-step framework, not because I don't think that some distinctions of that kind can be drawn, but because I think the Court did it in a clumsy way. The appealing way to read this language would be to assume that what it means is this: when a court has extracted all the guidance that it can possibly get out of the statute (this being "Step One"), and it still finds two or more policies that are in conflict with each other, it is for the agency to reconcile those policies.

If that's what it means, it's completely in accord with traditional law. It simply means that the agency reasoning that the court examines under "Step Two" is a pure exercise of discretion, closely related to what Cass was calling a mixed question of law and fact. Naturally, since the court has found no congressional guidance, it is for the agency to make the decision. A report is now sitting in your hands that makes this point explicitly.⁴⁷

Unfortunately for my interpretation, Justice Stevens talks about both steps in his process as "statutory construction" steps. He suggests that you break down statutory construction into two phases, in one of which you have deference and in one of which you do not. This seems contrary to our usual assumptions about how courts, indeed all lawyers, go about construing a statute. Normally they look at what the statute has to say by looking at all the indicia of construction at once. It doesn't seem intellectually justifiable to split that process into two parts.

I would say that you can only have one step constituting statutory

⁴⁷Levin, *supra* note 1, at 251.

construction, which we have been calling Step One. After that, what happens is application or use of discretion, which, of course, is reviewed deferentially. It doesn't help to try to break the process of statutory interpretation up more finely than that.

Given that there's only one statutory construction step, I have a further critique of the language of *Chevron*, at least as it is being understood in some judicial quarters. The exact language that *Chevron* uses is that the inquiry is whether Congress has "directly addressed the precise question at issue."⁴⁸ It is being interpreted to mean that the inquiry is whether Congress has addressed the *narrow* question at issue. In other words: has Congress talked about the bubble (or whatever the factual situation might be)? No? Then on to Step Two.

But the Court's language is whether Congress has addressed the *precise* question at issue. Sometimes the precise question framed by the parties can be a fairly broad question, one that requires identifying the broad purposes or the analytical framework that the statute contemplates. Questions don't just come out of nowhere; they come because parties present them to the court. And if the parties tender a broad question of that kind, then that question is one that the court has the expertise and responsibility to decide. That is how I would read *Chevron*, and how I think it was intended to be read. And so cases like *Benzene*⁴⁹ and *Cotton Dust*,⁵⁰ I think, are still valid, because it is for the court to determine questions like whether "feasibility" means cost-benefit or the maximum that the industry can stand, and whether a "significant risk" must be shown in order for OSHA to regulate. This is carried forward in some cases during the past term as well, and I think remains the law.

My point can easily be illustrated a little further if we look at a slight variation on the *Chevron* facts. Suppose that EPA had adopted the same bubble policy, saying, "We're adopting this policy because it's very important to reduce burdens on industry," and saying absolutely nothing else. It would still be true, if that case were to come up for review, that Congress would not have addressed the *narrow* question at issue. And yet it seems equally clear to me that the Court would reverse, because the account given by the agency would have neglected one of the policies that the Court found Congress had intended for the agency to consider, namely whether the interest in environmental protection outweighed the interest in relaxing the burden on industry.

As long as we understand *Chevron* the way it's written and not the way

⁴⁸467 U.S. at 843.

⁴⁹*Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

⁵⁰*American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).

it is sometimes depicted, and we simply ask the court to decide *any* question of legislative intent that is framed by the parties, I think it's a much less troublesome opinion and one that fits current law much better.

Finally, and I won't drag this out too much longer, the question is how much deference the agency gets in that determination.

My basic notion here, which I think has been mentioned by Alan Morrison as well, is that you can't answer this question by looking at only one opinion. Usually when the Supreme Court speaks, it settles the law in the particular area it's talking about, because its decision is the only precedent in that field. But in the area of deference to agency constructions, the Court hands down some two dozen opinions a year. I think you get a much better sense of where the Court is going by looking at the broad picture than by trying to take one opinion and assume it states the only truth. Now, at one pole, you have a *Young v. Community Nutrition* which does manifest an enormous apparent degree of deference. On the other hand, just during the past term we have the *Dimension Financial* case which has been mentioned before, the nonbank banking case. We have a case called *Louisiana Public Service Commission v. FCC*⁵¹ which reversed an agency on a pure construction issue. We have a tax case called *Hughes Properties*⁵² in which the Court overturned the IRS's interpretation of a regulation, although agencies' constructions of their regulations have often been thought to command even more deference than their constructions of statutes.

I am suggesting that if you look at opinions at large, you don't see quite as much deference as you might expect by looking at either *Community Nutrition* or *Chevron* by itself.

Now, I hear you ask: "How can I, with my busy practice, manage to look at all those cases and get some sense of the broad picture?" Well—you can't. But an effort was made to synthesize the cases in the orange volume before you.⁵³ I will note for what it's worth that, although there was much protest about an early draft of this section of the report⁵⁴ from various agency counsel who saw it, the version that you now have before you met with resistance from none of the administrative lawyers who reviewed it. So there is at least some slight indication that the report reflects a consensus view on how much deference an agency can be expected to get.

⁵¹106 S. Ct. 1890 (1986).

⁵²*United States v. Hughes Properties, Inc.*, 106 S. Ct. 2092 (1986).

⁵³Levin, *supra* note 1, at 267–70.

⁵⁴Levin, *Federal Scope-of-Review Standards: A Preliminary Restatement*, 37 AD. L. REV. 95, 120–21 (1985).

JUDGE STARR: I already have my copy, incidentally. It's very useful.

I'd like to respond very briefly to a couple of points. There's one which Alan made with respect to the third danger signal, which is "when the purpose of the statute is being subverted." I do think that *Chevron* itself, fairly read, as well as its progeny, comfortably permits that in Step Two. It seems to me that one of the first things that the court does in fact note in its Step Two consideration is whether the action being taken is indeed antithetical to the thrust of what Congress was trying to achieve—its meta-intent, to use Professor Sunstein's word.

The other thing is that mention has been made of one of my favorite cases, *Young v. Community Nutrition*. I will simply say that I think *Young*, dispassionately viewed, is again a case of managerial muddling through. The agency had a very difficult job on its hands. While the statute might more naturally be read in one direction, it does not seem as if the agency was doing anything other than trying to go about its job of administering and managing in a very difficult area. It would gum up the works if a very literal, fundamentalist reading of the statute, as the learned court of appeals would have adopted, in fact obtained.

Looking at it in the spirit of Professor Levin's comments, let's examine what has transpired since *Chevron*. I do think that managerial muddling through is a principal theme. When there is the second danger signal that Alan sees, namely the aggrandizing of power, the Court does in fact seem to put on its high phase, if you will, and read the statute much more carefully. Perhaps it would be better, in the spirit of Marvin Frankel,⁵⁵ if we were all more candid about what we are doing.

PROF. SUNSTEIN: Just very briefly, a historical point. On the plane I was reading James Landis's *The Administrative Process*,⁵⁶ which really was a kind of theoretical foundation of the administrative state. This is a very liberal book, and it was all pro-agency and anti-court. It's important to keep in mind that there is only a contingent historical association between the current deference to administrative agencies and conservatism. And opposing deference to administrative agencies and being liberal is a contingent position. The institutional judgment ought to be decided, I think, on some ground other than the political one.

I think that view is shared by all of us here.

The second point—I think the managerial judgment point made by Judge Starr is a nice one, and I hope it represents the direction in which

⁵⁵M. FRANKEL, *The Adversary Judge*, in *PARTISAN JUSTICE* 39 (1980).

⁵⁶J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

the lower courts and the Supreme Court are going. It may, in fact. The reason I like it so much is that the distinction of managerial judgment versus pure law runs up nicely with my distinction between the pure question of law, where *Marbury v. Madison* kicks in, and the issues where administrative institutional competence is highly relevant. That may be *Chevron* itself. To me it is *Chevron* itself. To me it's not *Young*; I continue to believe the lower court decision there was correct.

A third and final point. Mr. Willard said, and this is really a disagreement between us, that there is no reason to believe courts are better than administrative agencies at deciding questions of law, and that *Marbury v. Madison* is misread when it's understood to stand for the position that there is distinctive judicial competence in lawmaking. That is a big disagreement. *Federalist* No. 78, Hamilton's defense of judicial review, makes the point that foxes shouldn't guard henhouses. It isn't simply a matter of saying that, in the context of cases, courts do what they do. The point is that limitations on the scope of legal authority should not be decided by those who are subject to the limitations. Of course it's true that courts make those decisions in the context of cases only. Yes. But it is not the case that administrative officials are, under the constitutional scheme we have, as competent as courts in saying what the law is.

* * *

PROF. LEVIN: We are now ready to proceed to the second of our major topics for today's discussion, a discussion of *Heckler v. Chaney*.⁵⁷ We have been discussing up to now the scope-of-review rules that apply in so-called normal cases. We now move to a somewhat more restricted context, one that's been very controversial recently, the rules for judicial review of agency decisions not to take action, and other manifestations of what we might call prosecutorial discretion.

It is especially topical now because it's the type of problem that's naturally going to come up in situations where you have an administration that is relatively unenthusiastic about enforcing statutes that more liberal administrations and Congresses have created in the past. But this topicality doesn't predispose how we're going to come out on it. For the authoritative word on that, the Assistant Attorney General.

MR. WILLARD: My remarks today are going to be a little bit tentative, unlike those of some of my more scholarly colleagues. I would like to suggest a few thoughts on the theme of formalism and functionalism in judicial review of agency action and inaction.

⁵⁷470 U.S. 821 (1985).

In the *Chaney* case, with which I suppose most of you are familiar, the facts are fairly bizarre. We had a group of prisoners who were on death row and who sued the Food and Drug Administration on the theory that the drugs used for lethal injection were unapproved. They claimed that this was an unapproved use of an approved drug and violated the Act's prohibitions on misbranding. (In fact, at one point we had a case, not the *Chaney* case but another case I was involved with in Texas,⁵⁸ where they asked the court to issue a TRO to the Marshal Service to go out and actually seize the misbranded lethal injection drugs from the state prison at Huntsville.) The *Chaney* plaintiffs also suggested that the Food, Drug and Cosmetic Act's requirements for the approval of new drugs should be applied, and that the FDA would have to decide whether the lethal injection drugs were safe and effective for human execution before they could be introduced into interstate commerce.

The theory of the case was really quite ridiculous. In fact, the Supreme Court's opinion characterized the grant of certiorari as to review the "implausible result" reached by the D.C. Circuit.⁵⁹ The lower court required the FDA to exercise its enforcement power to assure that the states only use drugs that are "safe and effective" in human execution. The Supreme Court unanimously reversed, and even Justice Marshall, who didn't agree with the majority opinion, agreed that the D.C. Circuit was wrong.

The Court went on to hold that ordinarily an agency's refusal to exercise enforcement discretion is unreviewable. There's a presumption, although the Court outlined many exceptions to this doctrine. It was laying down basically a rule of statutory construction, of interpretation of the APA, and of administrative statutes generally: if Congress clearly wanted to make this kind of decision subject to judicial review, it could, but ordinarily the courts would assume they did not want to.

What I think is interesting about this case, though, is not so much the precise doctrine it announced for deciding when agency action is or is not reviewable, as to which there is a fair amount of unanimity on the Court, but the style of judicial reasoning. It calls to mind what I regard as one of the most brilliant pieces of scholarly legal writing I have ever read. It's now Justice Scalia's article for the *Supreme Court Review* on "*Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court,"⁶⁰ in which he illustrated the point I would like to make. That is,

⁵⁸See *O'Bryan v. McKaskle*, 729 F.2d 991 (5th Cir. 1984).

⁵⁹*Chaney*, 470 U.S. at 827.

⁶⁰1978 SUP. CT. REV. 345.

that the D.C. Circuit and the Supreme Court have continued to adopt diametrically opposite approaches dealing with administrative law questions. The Supreme Court repeatedly invokes formalism and refers to the APA as the charter of administrative law. It always starts with this sort of hornbook explication of the APA and what it means. The D.C. Circuit could care less. It is interested in doing justice and having practical and functional approaches to these complex policy problems. You would think that after a while the D.C. Circuit would get the hint. Justice Scalia's article is fairly biting in its criticism and illustrates with great clarity the extent to which the D.C. Circuit at that time would go to evade the clear teachings of their superior court. I think that trend has continued unabated, and *Heckler* is a good example of it.

Finally, we have a fairly recent example I'd like to mention, involving again a reviewability issue: *Ciba-Geigy Corp. v. U.S. EPA*,⁶¹ which involves a question about whether a letter from an agency official is subject to judicial review. A majority of the panel of the D.C. Circuit held that it was.

I would just briefly like to look at the style of judicial reasoning. The court, first of all, says that this ripeness issue involves a pragmatic balancing. "The judiciary's ultimate determination of ripeness in a specific setting depends on a pragmatic balancing of . . . two variables and the underlying interests which they represent. Under this 'practical common sense' approach, the ripeness inquiry does not turn on nice legal distinctions."⁶² This is the approach the Supreme Court has repeatedly repudiated for administrative law, because the Supreme Court always goes back to the nice legal distinctions—the words of the APA, for example. But no, the D.C. Circuit takes a broader, more pragmatic and functional approach.

Going further, the court in *Ciba-Geigy* concluded that the term "agency action" encompasses an agency's interpretation of law; it further concluded that this interpretation can be expressed in a letter; and therefore, in the circumstances of this case, the letter from the agency was final enough to be subject to judicial review.

Another factor about the D.C. Circuit's approach to these cases, and particularly its approach to Supreme Court precedent, is its willingness to engage in fairly thin distinctions of Supreme Court teachings. Justice Scalia's article, I think, illustrates this quite well: The extent to which the D.C. Circuit will go to cite D.C. Circuit precedents on points

⁶¹801 F.2d 430 (D.C. Cir. 1986) (Starr, J.).

⁶²*Id.* at 434.

for which there is clear Supreme Court teaching, which is never cited, or which is distinguished in fairly flimsy ways.

One of the arguments made by the dissent in *Ciba-Geigy* was that this approach is inconsistent with the *Chaney* decision, which said that prosecutorial decisions are generally not subject to review. Since the agency had not yet instituted some kind of an enforcement action, the sending of a letter expressing their view about what they were going to do was not sufficiently final, in terms of agency action, to be reviewable.⁶³ But the court had no trouble dealing with this allegation, or the concerns of *Heckler*, because it said in a footnote that, “[b]ecause the complaint states a colorable allegation that [Congress has fallen under one of the exceptions to the *Chaney* doctrine], we are not at liberty to decline jurisdiction for fear of interfering with prosecutorial discretion.”⁶⁴ In other words, a colorable allegation that the Supreme Court’s teaching doesn’t apply is enough to make it not apply!

The point I would like to make, though, is that this is not a political difference. In other words, as Alan and Cass have both said, and I firmly agree, the difference in approach to administrative law between the D.C. Circuit and the Supreme Court is not a liberal-or-conservative thing. Whether or not the result is pro- or anti-business depends on what administration is in power and what they are doing. The Supreme Court has with almost remarkable unanimity advocated the formalistic approach to administrative law, and that includes Justices like Stevens and Brennan, who would be thought of as being quite liberal on other issues.

Similarly, the D.C. Circuit has demonstrated a tendency, including judges who might otherwise be thought of as being conservative, to adopt the functional or pragmatic or flexible approach to administrative law. During the Carter administration businesses were happy to run to the D.C. Circuit and seek judicial review to halt oppressive agency regulations, just as public interest groups are happy to go there now to try to halt deregulation under the same kind of judicial approach that will allow the courts to take a probing, thorough, searching review of the agency’s action or inaction.

You can probably tell from my remarks which approach I think is preferable. But regardless of which one is preferable, I also have a view as to which of the two courts ought to be the supreme authority in this field!

The remaining points I would like to make are on the question of

⁶³*Id.* at 442 (Silberman, J., dissenting).

⁶⁴*Id.* at 436 n.8 (majority opinion).

whether or not agency inaction, which was the issue in *Heckler* and raised in many of these other cases, ought to be subject to the same kind of review as agency action. I think the answer is no, for three reasons: for policy reasons, for administrative law reasons, and for constitutional reasons.

Looking at policy—I realize that Cass has not had a chance to speak yet, but I've read a couple of his recent law review articles which have talked about this,⁶⁵ and so I will try to express his views, although he may be better at it than I will be. He argues that public policy favors an even-handed approach to review of action and inaction, because there is a risk that people who are beneficiaries of statutory schemes will be deprived of those benefits if an agency refuses to carry out the statutory mandate. To him this is, as a policy matter, something that is just as important as where an agency is excessively zealous in carrying out a statutory mandate. He says the courts should be particularly attuned to dealing with this danger, because agencies can be subject to factional and corrupt special interest pressures that will cause them not to carry out the congressional mandate as faithfully as they should, whereas the courts are better at transcending those pressures.

I think there are some problems with this view, though. I think that Congress is just as subject, if not more so, to special interest factionalism in legislating as the executive is in executing the law. Actually more so, because Congress is so diverse, especially the House of Representatives these days, with redistricting going the way it is, with very homogeneous districts. Special interests have very frequent access to the legislative process.

In terms of just simply public policy, I'm not sure there is any reason why the administrative process should be subject to some kind of special scrutiny to ensure that the process is done fairly and even-handedly, unless you are going to review the legislative process for the same reason. Anyone who has seen the so-called transition rules in the tax reform bill knows that it's not unheard of for special interests to obtain booty through the legislative process.

For that reason, it's not as though we have a Congress that is pure in its intent and an executive that's corrupt. We have a political process at all levels. If, as a public policy matter, we ought to put the executive interpretative process under a microscope, then why not the legislative process too, to find out what kind of special ex parte contacts, for example, occurred with congressional committees? The ex parte contacts rule which was created by the D.C. Circuit out of whole cloth⁶⁶ may

⁶⁵See Sunstein, *supra* note 40, at 655–57.

⁶⁶*Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

or may not be a good idea, but it seems to me it is just as good an idea for legislative committees as it is for executive agencies, in terms of the purpose of preventing special interest greed.

There is the same question about the courts. Cass has developed the view that the courts are good at redressing this imbalance because frequently the political process can't, because beneficiaries of the statute are diverse and may be poor and may not have adequate access to the political process, whereas special interests do.⁶⁷

I think the same problem inheres in litigation. Public policy matters also frequently burden people in a diffuse way while benefiting people in a very particularized way. Sometimes beneficiaries are better placed, not only to participate in the political process, but also to initiate litigation to challenge something they don't like. Let's take an entitlements program, spending money. The people who get the entitlements, whether they be farmers or businesses, poor people or whatever, have a very particularized reason to try to defend and expand the entitlements program. The taxpayers who pick up the bill are very diffuse and spread out and much less likely to want to participate in litigation.

My point is not that the scales tip one way or another. It's just that beneficiaries of statutory schemes may or may not have diffuse interests. People who are burdened may or may not have diffuse interests. I'm not sure there is a reason that the scale should necessarily be tilted one way or another, or a reason to prefer judicial review as a means of dealing with these problems as opposed to the political process.

Let me just briefly turn to my remaining two points. The question of the meaning of the Administrative Procedure Act—as Cass has pointed out, the purpose of the Administrative Procedure Act was to limit and control agency action, not inaction. I think therefore the APA is not neutral as between agency action and inaction. That's not to say inaction is never reviewable. Sometimes it is. But I do think that the APA was adopted for the purpose, quite clearly expressed in its legislative history, of disfavoring agency action—burdening agency action and not inaction.

Finally, I would like to look at the Constitution. Here again the Constitution is not neutral as between governmental action and inaction. The purpose of the Constitution was to protect the people against government action, not to compel the government to act to benefit people. Our Constitution contains none of the Soviet-style constitutional rights, such as the right to an adequate amount of leisure time or

⁶⁷Sunstein, *supra* note 40, at 669.

an adequate standard of living. Our Constitution primarily imposes limits on government, and for that reason I don't think our system is neutral as between whether a government agency acts or does not act. I think that reflects also the separation of powers doctrine and impacts on judicial review of agency action.

In terms of the allocation of powers among the branches, my view is that when Congress legislates, obviously the legislation controls, in terms of what it does. Congress can leave gaps by legislating in broad or general terms. When that occurs, it falls to the executive, in executing the laws, to fill in the gaps. When Congress authorizes an agency to take certain kinds of actions, it provides general statutory guidance. The task of filling in the gaps, unless the statute directs otherwise, is one that is left to the agency and not to the courts, regardless of these other institutional arguments. After all, certain executive agencies are responsible to the President, who is an elected official and is able to harmonize varying interests and try to ensure that agencies act in the public interest in a coordinated way.

MR. MORRISON: As Richard was speaking, I looked at my announcement for this program and confirmed that the topic was not the debate over whether we should reestablish a limited monarchy in the United States, but what we should do about *Heckler v. Chaney*! So I thought that at least I would try to talk about that topic.

My purpose here today is neither to praise *Heckler* nor to bury it. I would have to acknowledge at the beginning that I had the presence of mind to file an amicus brief when I saw this case granted on the merits in the Supreme Court. We said to the Court, "Please, dear God, don't do what the Justice Department wants you to do and wipe out all judicial review." I think perhaps as a result of our brief there are at least four or five footnotes in the opinion which say, "we are not deciding all of the following issues," which we asked them not to decide, although we also asked them to decide something else as well.

Nor do I intend to discuss the question on which my friend Ken Geller accused me of misstating the record—whether the reason the agency gave in *Heckler* for not going ahead was simply a throw-in. You may recall the original decision by the FDA. (It was *in a letter*, I might add, because that's how they respond to all petitions—I can't figure out any other way to get them to respond to anything, but at least they do write letters once in a while. That's the only way, it seems, to get into court with them.) The letter said, "we refuse to undertake this little exercise that you've asked us to do, because this comes within the practice of medicine exception to the Food, Drug and Cosmetic Act." Lo and behold, when that issue got to the D.C. Circuit, everyone, including Judge Scalia, said that's ridiculous. When it got to the Su-

preme Court, the government didn't seek to defend the decision on the ground that it was part of the practice of medicine exception. They just said, we have prosecutorial discretion.

If you look at the letter that was sent out by the FDA, you will see language very akin to letters that I have seen many other times in the past. It said, "and besides, even if we could do it, it's a waste of time. We don't want to bother to do it." That is, they ground out the usual final, defensive sentence. If you go look at the record, you may read it differently than I. I suggest to you that this was nothing but a form at the end, saying "prosecutorial discretion." I said it was a throw-in, and maybe the court ought to be given an opportunity to allow the agency to decide whether it was really exercising prosecutorial discretion. That would be a different case.

In any event, what I'd like to do is look at the paradigm enforcement case under *Heckler*, ask some questions about that, and then go through some other situations and see to what extent those same reasons should or shouldn't apply.

Let's assume for the moment that a landowner who has some property asks the EPA to bring an enforcement action against the W. R. Grace Company because it's polluting the land. The groundwater is leeching onto their property, their children are dying, and as a result they want the EPA to go after the company. They ask it to bring civil and criminal enforcement proceedings. The EPA says no for any number of reasons: the company isn't violating the law; the law doesn't apply; it is simply a technical violation; and the EPA is simply too busy and has other things to do with its time and money.

In theory, under *Heckler*, in all of those cases the reason the Court would say we don't want to get involved (and the district courts shouldn't get involved) is there is "no law to apply."⁶⁸ But what if, for instance, the sole reason given in *Heckler* was that the practice of medicine exception applies? "That is the sole reason. We have no other reason for refusing to do it. Our hands are tied behind us." Is there no law to apply in that situation? Can the Court really have meant that? Or in the EPA case, the same kind of question could arise.

Of course, it's important to ask, is the homeowner in our hypothetical without remedy? Cannot that person whose property was injured go out and sue the company itself? Indeed, couldn't the defendants on death row in *Chaney* have gone and done that themselves? In fact, a number of them did that before they asked for help at the FDA. They had gone into the state courts and claimed that death by drug injection

⁶⁸470 U.S. at 834-35.

violated the Food, Drug, and Cosmetic Act, and therefore they could not lawfully be executed. You can imagine what kind of reception they got in that case, with state officials on the one hand and state courts on the other. You didn't have to get to the practice of medicine exception. They just simply said, "No, you must be kidding"—which is what Justice Rehnquist said. And maybe ultimately it makes sense to say "you must be kidding." But there must be a better way of saying it than simply that.

Well, why didn't the Court say that that's really what's at stake here? Why this camouflage effort? I don't know. But it does seem to me that even in the paradigm enforcement case, under certain circumstances, where a person has no other remedy (and that's not likely to be true in many cases, although it may be in some), it may well be that *Chaney* doesn't mean what it says.

Now let's move to a few other situations. Let's take the far more common situation of rulemaking. There is a rulemaking proceeding, and at the end of the proceeding, a potential beneficiary of a rule is dissatisfied. The claim is that the rule is a lousy rule—that the agency didn't go as far as he wanted—or that the rule is illegal—or that it's arbitrary and capricious—or that it's unconstitutional. Whatever it is, the bottom line is that it didn't help us enough.

Is there any reason to believe, if the agency didn't go far enough, that that's a kind of prosecutorial discretion? I suggest not. The courts have been reviewing those kinds of disputes for a very long period of time, and I think that those disputes can and should continue to be reviewable. Similarly, what happens if, at the end of a rulemaking proceeding that the agency has duly commenced, the agency, instead of issuing a lousy rule, simply issues no rule at all? They say, we don't think there's enough of a problem. Isn't that precisely the same kind of determination, albeit to a somewhat different degree, as in the last situation? Or what about the situation in which a petition is filed with the agency, and it sends a letter back saying, we decline to commence a rulemaking proceeding because we have no jurisdiction, or the practice of medicine exception applies, or we can't legally give you the relief you want even though we do have jurisdiction. Or we don't have enough facts to sustain a rule at this time, or even to begin a rulemaking proceeding at which we can gather more facts. Or the rule is simply not important enough—we've got too many other things on our agenda.

Does *Chaney* preclude all of those decisions from being judicially reviewed? I suggest to you that the answer may well depend upon the reasons given. I believe that the *right* to review should not depend on what the agency says. The question that should be asked, however, is

whether the *scope* of review is different, depending upon the reason given by the agency. I agree that when an agency says “we’re too busy, we can’t get to this matter now, there are 5,000 people a year dying from other substances, and even if your allegations were true, there’s only 100 dying from this substance, we simply don’t have enough resources,” the court should not be in the business of saying, “well, if you counted the numbers differently or if you really cared about it, you would have time for everything.” But that is a question of scope of review. It is not a question of whether you should get into court at all.

All right. Turning away from rulemaking, let’s get into other kinds of adjudications. How about formal adjudication? In a number of areas, for instance with the Federal Election Commission, a person whose complaint is turned down has a statutory right to go to court and get it judicially reviewed. The D.C. Circuit has recently reviewed a case involving a Mr. Orloski,⁶⁹ who had a dispute about an election. They did exactly in that case what the Supreme Court said they couldn’t begin to do in *Heckler v. Chaney*, although the plaintiff still lost. Should that difference turn upon whether Congress inserted a judicial review provision? I suggest it should not. The scope of review may be one thing; the right to review should be something else.

Or take informal adjudication, a case like *Overton Park*.⁷⁰ Did *Chaney* overrule *Overton Park*? I don’t think so, because in *Overton Park* they were complaining about what the agency in fact did. That is, it issued a permit to let somebody go through Overton Park. Or if the opposite had been true, if the Overton Park developer had been denied the permit to go through Overton Park, surely the developer could have gone to court without worrying about *Chaney* and whether a law enforcement proceeding was involved.

Then there’s another category of cases coming up, and I don’t know whether there are more of them in this administration or whether we’re simply developing a subspecialty in our own office—it’s called unreasonable delay, or “You can’t get us judicially reviewed if we won’t tell you what the answer is.” Right now, we have a problem in which they won’t even send us a letter back, to tell us whether they’re going to deny our petition. We want to go in and sue them, saying we are entitled to an answer—are you or are you not going to commence a rulemaking? Just an answer, yes or no. We’re entitled to that. Or: Are you or are you not going to take action on our complaint, even a *Chaney* complaint? Aren’t the plaintiffs in *Chaney*, even if they are not entitled

⁶⁹Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986).

⁷⁰Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

to go to court to object to the result when the agency doesn't do something, at least entitled to go to court and say, please, don't we get an answer?

On this, fortunately, the APA is quite specific. It specifically proscribes unreasonable delay in two separate sections,⁷¹ and the courts to date, as far as I know, have been unanimous in saying that there are standards, albeit loose and flexible ones, for saying when enough is enough. At least the agencies have got to tell the court and the parties what their intentions are. I suggest to you that it shouldn't matter whether it's a rulemaking or an enforcement procedure—unreasonable delay is unreasonable delay. And that applies in spades in a situation in which there is an ongoing proceeding, in which the agency has had comments in for months or years, and it is sitting around and sitting around, putting off a decision in order to avoid difficulty.

Then let me take the last of my set of examples, the most difficult I am sure, and that is the *Adams v. Richardson*⁷² wholesale refusal to enforce the law. *Adams* was a case in which in many prior administrations—the case is still going on, I think—there have been charges that the Department of Health, Education and Welfare simply refused to enter into the civil rights fray at all. They were sitting on the sideline, and the statute gives clear responsibilities (obligations, as the D.C. Circuit found) to do certain things—that is, they have to enforce the law. If the states don't do what the law says, then the agencies are supposed to do any of a number of things. The court in those cases is not concerned with saying you must do A, B or C, but that you can't refuse to do all of them.

There is, of course, a footnote in *Chaney* to that effect⁷³—which reminds me of the old adage that footnotes are for losers, rather like statistics in football games. I do think that that is a different kind of case, once again. Or what if, to take an example near and dear to the heart of this administration, the United States Attorney had the temerity to decide that he was not going to waste his resources on pornography cases, that he had better things to do, like putting drug dealers in jail. If there was a big porn shop that opened up next door to my house, would I have standing to come into court, or would that be a situation in which the U.S. Attorney can say, we simply aren't going to enforce the law any more?

Well, if you read *Chaney* and try to get to the philosophical underpinnings of it all, its basis is: "Look, this is a political system of accountabil-

⁷¹5 U.S.C. §§ 555(b), 706(1) (1982).

⁷²480 F.2d 1159 (D.C. Cir. 1973) (en banc).

⁷³470 U.S. at 833 n.4.

ity. We elect Presidents and we have political contests over this question." I want to ask you—how many people in the world do you think are going to decide whom to vote for in 1988 based upon whether the Food and Drug Administration went after drugs or not in *Heckler v. Chaney*, or whether they're going to go after the porn shops in my hypothetical? The Court has a very interesting notion about how responsive our government is to each and every citizen, but one that I suggest to you has no bearing in reality.

Nor do I suggest to you that it would be any better for Congress to try to get itself involved, even if after *Chadha* there were some realistic possibility that it could constitutionally do so. Congress cannot—indeed should not—try to get involved in every single situation in which an agency doesn't enforce the law. The question really is, what are we supposed to tell people who see laws on the books and believe that the laws are there to be enforced by the agency? Shall we simply tell them to go on in their own way, and someday in the election for President they can win on the ground that the prior party in office didn't enforce the law?

It seems to me that, as imperfect as the courts may be from time to time (and they are, every time I've lost a case), there isn't a whole lot better alternative here, and I, for one, am not prepared, deferentially or otherwise, to turn the matter over entirely to the executive branch.

Thank you very much.

JUDGE STARR: Let me make one very quick observation with respect to Mr. Willard's comments on formalism and functionalism. He sees the Supreme Court speaking with unanimity, and I agree that in this area it has spoken with unanimity in a surprising number of cases; but on a closer analysis, as Professor Levin has tried to indicate, the tapestry is considerably richer. With respect to the specific recent case of which Mr. Willard spoke, a case in which I have considerable interest,⁷⁴ the court's remarks with regard to pragmatic considerations were taken from a functionalist opinion written by that formalist Justice, Justice Harlan, in *Abbott Laboratories*.⁷⁵

PROF. SUNSTEIN: Mine is a plea for equality. If an administrative agency acts, there is a presumption of reviewability. If an administrative agency doesn't act, there is now a presumption of unreviewability. The presumption of reviewability isn't made up by the D.C. Circuit. It comes from the legislative history of the Administrative Procedure Act. What is the basis for this inequality created by *Heckler v. Chaney*?

One possibility: Congress, in writing the Administrative Procedure

⁷⁴*Ciba-Geigy Corp. v. EPA*, 430 (D.C.Cir. 1986) (Starr, J.).

⁷⁵*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Act, was concerned, Mr. Willard said, with action. Yet the APA defines "action" to include failure to act.⁷⁶

Possibility number two: The nature of the right. In some cases one has private property or private liberty; in others, one has statutory rights, rights to protection from occupational injury, or rights to protection from environmental harm, or rights to protection from discrimination. I don't think the latter category of rights is less important than the former. Besides, what I think doesn't matter. What matters is what Congress thinks. And Congress has defined "agency action" to include failure to act and has said that courts may compel agency action unlawfully withheld or unreasonably delayed.⁷⁷

Another thing that might make a difference and justify a lack of equality between beneficiary rights and the rights of regulated parties is that in one case there is political control. It's said that the beneficiaries can go to Congress. Well, the regulated industries don't have to; there's a presumption of reviewability for them. I agree with Mr. Willard that the scale shouldn't be tilted. There's no reason to think that those who want agency action are any more or any less politically powerful than those who don't want it. The scales should not be tilted either way. Judicial review should be available for both.

The last possibility referred to by the Court is the "Take Care" clause of the Constitution,⁷⁸ which says the President "shall take Care that the Laws be faithfully executed." To me that doesn't mean that agency inaction should be presumed unreviewable. The "Take Care" clause is a duty, not a license.

There is one difference between agency action and agency inaction. This is a prudential consideration referred to by now-Chief Justice Rehnquist. That is, when agencies are enforcing the law, they have to choose from among a wide spectrum of possibilities. And that counts. If an agency is not enforcing the law in Case 1 because it has a million other cases, that is perfectly okay. No problem with that. That's why *Heckler v. Chaney* was correctly decided, though in my view not correctly reasoned.

All this suggests that agency action and agency inaction should generally stand on the same footing, with the exception that enforcement activity includes allocation of scarce prosecutorial resources. That does not mean what the *Heckler v. Chaney* Court suggests it means, that there should be a presumption of unreviewability for agency

⁷⁶5 U.S.C. § 551(13) (1982).

⁷⁷*Id.* § 706(1).

⁷⁸U.S. CONST. art. II, § 3.

inaction. What it means, instead, is that *on the merits* agency inaction will very, very, very frequently be perfectly lawful, because you have a lawful allocation of scarce resources.

The D.C. Circuit, correctly reading *Heckler v. Chaney*, has understood it very much in these terms. The court has understood the case to say what now-Chief Justice Rehnquist says—which is, when there is “law” to control administrative agency inaction, when a statute controls that inaction, then the decision is reviewable and the presumption of reviewability kicks in.

PROF. LEVIN: I’m going to waive my own opportunity to comment, because my comments on *Chaney* are expressed in the Restatement report itself,⁷⁹ and because I want to give an opportunity for anyone who has questions for these speakers to ask them. If you do, there are microphones standing on your right or left, or both, depending on where you’re sitting.

JAMES T. O’REILLY:⁸⁰ I believe in the pendulum theory of administrative law, and I think that the *Chevron* discussion and particularly Alan’s comments on it prove that. (Alan, on behalf of the Senator Bumpers Alumni Club, we’re sending you a backdated honorary membership card from seven years ago, now that you find some merit in his amendment!)

In my field, though, food and drug law, we often hear the statement made by a former Chief Counsel of the FDA that the statute is a constitution, that unless FDA is prohibited from acting, then the FDA has the power to act, and that the FDA can update the 1930s New Deal legislation by adding regulations it feels are necessary.⁸¹ I think that *Chevron* carries that notion even further, and even says that, in addition to the FDA creating what it can, the courts will be willing to defer, in light of the ambiguity in that 50-year-old piece of legislation.

But again, I believe in a pendulum theory, and I try to emphasize to my students that the courts will swing back. My question to the panel is, if the courts will swing back from *Chevron*, what will be the indicia of that chain? What should we look for to see greater constraints upon agency discretion, and what elements, what facts, or what kinds of agency actions will cause the pendulum to swing back?

MR. MORRISON: All I can say is that I think the better cases come up where there are some visceral reactions, some danger signals. If I were

⁷⁹Levin, *supra* note 1, at 284–88.

⁸⁰Corporation Counsel, Procter & Gamble Co.; Adjunct Professor of Law, University of Cincinnati.

⁸¹Hutt, *Philosophy of Regulation Under the Federal Food, Drug & Cosmetic Act*, 28 FOOD DRUG COSM. L.J. 177, 178 (1973).

going to start challenging *Chevron*, that's where I would first try to say, "You surely didn't mean to apply it in that area." It would be a chipping away first, and then perhaps an unadmitted pendulum would swing back the other way.

My own view is that *Chevron* is good law when the courts want to decide in the agency's favor, and they disregard it when they don't. There are simply many cases in which they don't bother to cite *Chevron* and the agency loses.

RODOLPHE J.A. DE SEIFE:⁸² I also teach my students the pendulum approach to law. Are we resuscitating the nondelegation doctrine?

MR. MORRISON: Well, I tried to resuscitate it but didn't succeed in Gramm-Rudman.⁸³ The majority said they weren't going to decide it. Two Justices said—well, if you can figure out what they said, I'll be glad to hear from you—I think they said something like what I was going to say but not quite what I said. And two other Justices said they agreed with the lower court, which included now-Justice Scalia. So who knows where the nondelegation doctrine is?

PROF. DE SEIFE: It's not dead, that's the point.

MR. MORRISON: Well, some of us don't think it's dead, although one could hardly say it's revived with the same vigor it once had.

MR. WILLARD: I think the nondelegation doctrine is and ought to be dead. The doctrine misconceives the nature of what Congress does (and I think this goes back to what we were talking about before) when it empowers an executive agency to act. It doesn't delegate a piece of the legislative power to the executive branch, which will then exercise it as an "agent of the legislature." What it does is that it creates authority in the executive branch, and when the executive branch carries out that authority it is executing the law. It's not exercising a delegated lawmaking function.

Then, when the courts review that exercise of authority, they are doing something entirely different. They are exercising a judicial function to decide a case or controversy in light of the applicable law. So I think the words "delegation" and "quasi-legislative" and "quasi-judicial" are all very misleading terms, in that they obscure the proper separation of powers analysis.

PETER L. STRAUSS:⁸⁴ This may be turning into a forum for professors of administrative law, but I want to ask a question about the possible virtues of confusing the scope of review question with the merits, in the following way. The Supreme Court—

⁸²Professor of Law, Northern Illinois University.

⁸³*Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

⁸⁴Betts Professor of Law, Columbia University.

MR. MORRISON: Is this a *Chevron* question or a *Chaney* question or both?

PROF. STRAUSS: It's more a *Chevron* question than a *Chaney* question, but I think it has elements of both.

The Supreme Court decides 150 cases a year on all subjects, in the course of attempting to administer national law. The courts of appeals are in the position of deciding cases much more frequently, for limited geographical areas, but in cases which bear on the administration of national programs nonetheless. I wonder if it isn't important to view *Chevron* as an aspect of the Supreme Court's management of the courts of appeals—particularly, perhaps, this unending struggle between the D.C. Circuit and the Supreme Court. One aspect of that management, which may in the long run tend to give more room for uniformity in the administration of national programs, would be to send the courts of appeals the message that they are not to interfere with reasonable statutory interpretations of administrative agencies. There's a natural tendency for a court of appeals to become absorbed with the immediate, local consequences of adopting a given interpretation of a regulatory statute. *Chevron* helps correct this tendency by requiring courts to defer to the interpretations of agencies that bear direct responsibility for implementing the program as a whole. Instead of attempting a "point" solution, which can and probably will vary from circuit to circuit, reviewing courts are now invited to define a permitted zone—and those zones may overlap, allowing the agency to survive in all the circuits with a single definition. The agency's obligation to strive for uniformity in national administration can be achieved in other ways, as by making "consistency" a central element of the "hard look" review the Supreme Court endorsed in *State Farm*.⁸⁵

PROF. SUNSTEIN: For me, if one properly understands directly addressing the precise question at issue, that's a merits question. Did Congress make unlawful what the agency did? One should try to separate, to the extent possible, the question "does the agency win?," on the one hand, from, on the other hand, "does one have a thumb on the scales in the agency's favor when one approaches the merits?" Those are two separate questions.

I do think Professor Strauss is correct in understanding *Chevron* as an effort to give managerial guidance to the lower courts, particularly the D.C. Circuit. But I also think one wants to be a little bit more gentle on the D.C. Circuit, and not just because one of its members is here. The D.C. Circuit specializes in administrative law cases; it sees a whole

⁸⁵*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

spectrum of administrative law cases. The Supreme Court only sees occasional and maybe hard cases, and somebody has said that hard cases make bad law. Maybe on occasion in administrative law this kind of one-shot intervention has hurt rather than helped.

Keep in mind that there have been a lot of new appointments to the D.C. Circuit in the last few years, so one doesn't have the kind of ideological disparity one had in the recent past. But an occasional tension between the D.C. Circuit and the Supreme Court continues. It may be that's inevitable and not the product of bad faith in any way, but the product of different institutional perspectives. It may even, in the end, be not so bad that there's a tension between a specialist administrative law court and an occasional one-shot intervenor in cases of perceived abuses.

PROF. LEVIN: I'll make a brief comment on that also. It relates to the differing roles of the Supreme Court and the courts of appeals. Both I and Cass have criticized the Court today for muddling the distinction between pure questions of law and review for abuse of discretion. I would suggest that one reason why the Court may do that is that it very rarely reviews actual exercises of agency discretion. Most cases that come to the Court are framed as raising pure legal issues, and I think that is the type of question that the Court is most comfortable with. On the other hand, the lower courts find themselves obliged to distinguish law from discretion more sharply, because they have to review the agency decision as a whole, including discretionary and factual elements that the Court would be unlikely to grant cert. to examine in the first place.

But there's room for optimism about the future, now that the Court has its newest member, who is not only an administrative law expert but also has spent a couple of years on the D.C. Circuit slogging around in mundane administrative cases that raise these issues as wholes. Perhaps more rigorous treatments from the Supreme Court can be expected in the future for both those reasons.

MR. MORRISON: First, you were talking about hard cases making bad law. I think Justice Marshall in his concurring opinion in *Chaney* said that *easy* cases make bad law!

But Peter's point is interesting because, in a way, it is contrary to the point that the Court made just a year before in *State Farm*. For years most people had thought that if you argued an arbitrary-and-capricious case, that was the equivalent in administrative law terms to arguing the rational basis test under equal protection, i.e., you lost. One thing the Supreme Court said in *State Farm* is that you can win arbitrary-and-capricious cases, and once in a while we're going to even

let those folks in the D.C. Circuit get away with saying you can win them. So, if what they're trying to tell the courts of appeals is to keep their hands off, that message is hard to reconcile.

PROF. STRAUSS: No, because that kind of intervention will be much less disturbing to the agency. The courts of appeals also are occasional intervenors when it comes to a question of interpreting complex, extensive statutory schemes for which the courts of appeals hold no responsibility. It's quite a different matter for the court of appeals to say to an agency, "*In this one case* your result was arbitrary and capricious," than it is for the court of appeals to say to an agency, "Well, you read this complicated statute that way, we read it this way." Saying the latter may, in an arguably undue or unconscious way, mess up the entire statutory scheme, as Judge Starr has suggested in his presentation.

MR. MORRISON: I don't think we should have a full dialogue, but you have now put the question in a way which implies that the court of appeals had "just one little way to interfere" in *State Farm*, whereas they were "messing up the entire scheme" in the bubble case. One could equally well say that the bubble was "only one little part of the regulatory scheme," and in *State Farm* they were "undermining the entire Transportation Department."

To the extent that you are saying that when the issue goes to the essence of an agency's regulatory authority and deals with the entire question of how you ought to deal with a major substantive problem, I would agree that it may make more sense to give the agency deference. But I don't sense that the bubble case is that kind of an example, although I could be wrong about it. But if it were, it wasn't defended on that ground anyway.

HENRI F. RUSH:⁸⁶ My question to the panel has been touched on, I believe, but perhaps we could get some more comment. A number of pieces of recent legislation contain very precise standards by which a party's request for ruling is to be judged if turned down by the agency. In the case of my agency, a request for rulemaking in the rail area has a very specific set of criteria which we must go through.⁸⁷ Obviously that's reviewable—we'd never contend it's not—but does that suggest that all the other areas of rulemaking or refusal of rulemaking are not reviewable?

MR. MORRISON: My answer is no, but I'm sure Richard's answer would be yes. See, we'll get this in a brief: the other side'll say, "When

⁸⁶Deputy General Counsel, Interstate Commerce Commission.

⁸⁷49 U.S.C. § 10326(b)(2) (1982).

Congress wanted to be specific, it certainly knew how to do it. Since it wasn't, you don't have any law to apply and therefore you're left to the political processes."

MR. WILLARD: Alan understands me better than I understand myself!

What struck me about your question is the similarity to the question the Supreme Court faced in *Vermont Yankee*. There we had a situation of hybrid rulemaking procedures. Congress had indicated over a period of time a dissatisfaction with the rigid categories of the APA, by adopting special hybrid rulemaking provisions for certain agencies in certain situations. This may have indicated there was something wrong with the APA, but Congress never got around to amending the APA, and the Supreme Court said it was illegitimate for the D.C. Circuit to use its common law administrative power to rewrite the APA unless Congress wanted to.

My view is that while these statutes may indicate that modern thinking is that there should be more review of the failure to engage in rulemaking, unless and until Congress gets around to amending the APA to provide that, which I certainly think they could constitutionally, the traditional view should prevail.

PROFESSOR LEVIN: That concludes the time we have for questions. I'll turn the mike over to Ed Grenier for our closing.

MR. GRENIER: Thank you very much. I think we all agree that we have heard from a very skillful and just a wonderful panel, including our moderator. I have the impression they're all right, and that's really difficult. Let's give them a good round of applause.